

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1440

Cir. Ct. No. 2011FA212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

CRAIG T. DOPORCYK,

PETITIONER-APPELLANT,

V.

BROOKE A. DOPORCYK,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Craig Doporcyk appeals a divorce judgment. He argues the circuit court erred when it refused to allocate responsibility for payment

of a \$98,000 home loan from Craig's father, Thomas Doporcyk, and awarded Thomas an equitable interest in the parties' residence. We agree with Craig, and reverse and remand so the circuit court may exercise its discretion.

BACKGROUND

¶2 Shortly before Craig and Brooke Doporcyk were married, Craig purchased a residence, in part using funds from Thomas. Thomas provided \$74,000 as a down payment and for home improvements, and agreed to make the first two years of mortgage payments, which totaled \$24,000.¹ It is undisputed that this \$98,000 was a loan from Thomas, which was to be repaid with three percent interest by the time Craig graduated from college.

¶3 The parties reached an agreement on all divorce issues with the exception of responsibility for the \$98,000 loan. Craig wanted the obligation split evenly, while Brooke argued the debt was hypothetical and should not be assigned to either party.

¶4 The circuit court adopted Brooke's argument. Despite finding the debt to be a valid loan from Thomas, the court excluded it from the property division and awarded Thomas an equitable interest in the property. The divorce judgment provides:

Neither of the parties are ordered to make repayment to Thomas Doporcyk for the \$98,000.00 loan as the Court finds there is presently nothing due under this note and the debt is not assigned to either party in the division of assets

¹ The loan document states that Thomas would make twenty-four mortgage payments of \$1,200 each, which adds up to \$28,800. However, the document further specifies that the total amount to be repaid for the mortgage payments is \$24,000.

and debts herein. However, Thomas Doporcyk has an equitable interest in the parties' residence.

Craig appeals.

DISCUSSION

¶5 Property division determinations in divorce proceedings are within the sound discretion of the circuit court. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145. We will uphold such determinations unless the circuit court erroneously exercised its discretion. *Id.* An erroneous exercise of discretion occurs if the circuit court makes an error of law. *Id.*

¶6 The circuit court's refusal to divide responsibility for the \$98,000 loan was an erroneous exercise of discretion. Generally, debts incurred by either party before or during the marriage are divisible upon divorce. *Derr v. Derr*, 2005 WI App 63, ¶10, 280 Wis. 2d 681, 696 N.W.2d 170; *see also* WIS. STAT. § 767.61(1) (2011-12). There are exceptions for hypothetical or theoretical debts, or when the precise dollar amount of a debt has not yet been determined. *See Steinmann*, 309 Wis. 2d 29, ¶69 (citing *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 480, 377 N.W.2d 190 (Ct. App. 1985)). Here, the debt was not theoretical or hypothetical; the money was distributed and the debt was memorialized in a writing signed by both Craig and Thomas, and the court found the debt to be valid. Further, the current amount of the debt can be easily calculated. Consequently, the

circuit court should have included the loan in its property division.² We reverse and remand so it may carry out that task.

¶7 The court also erroneously awarded Thomas an equitable interest in the parties' residence. "Divorce actions and proceedings therein are entirely statutory; what the statute does not give, the court, however broad its equity powers in other matters may be, cannot assume." *Towns v. Towns*, 171 Wis. 32, 35-36, 176 N.W. 216 (1920); *see also Poindexter v. Poindexter*, 142 Wis. 2d 517, 546, 419 N.W.2d 223 (1988). A divorce court is powerless to make an order affecting an unrelated person who is not a party to the action. *See Torgerson v. Torgerson*, 128 Wis. 2d 465, 471, 383 N.W.2d 506 (Ct. App. 1986) (circuit court lacked authority to order husband's name removed from mortgage where mortgagee was not a party to the divorce action). Because the circuit court lacked authority to award Thomas an equitable interest in the parties' residence, we also reverse that portion of the divorce judgment.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

² Brooke did not file a response brief, which operates as a tacit admission that the trial court erred. *See State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993). Ordinarily we will not abandon our neutrality to develop arguments for the parties. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. However, we feel compelled to address the circuit court's apparent belief that uncertainty regarding the loan's due date meant the loan was exempt from division. Although it was not known when or if Craig would graduate from college, this uncertainty does not affect the validity of the debt or the need to determine the party or parties responsible for payment.

